

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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MICHAEL JENNINGS, #00A6254,

Plaintiff,

v.

ORDER  
03-CV-948

L MULLEN, M.D., et al.,

Defendants.

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This case was referred to Magistrate Judge Jeremiah J. McCarthy, pursuant to 28 U.S.C. § 636(b)(1). Defendants filed a motion for summary judgment and plaintiff filed a cross-motion for summary judgment. On September 13, 2007, Magistrate Judge McCarthy filed a Report and Recommendation, recommending that defendants' motion be granted in part and denied in part, and that plaintiff's cross-motion be denied.

Defendants filed objections to the Report and Recommendation on September 27, 2007. Plaintiff filed objections to the Report and Recommendation on October 9, 2007. Defendants filed a response to plaintiff's objections on November 6, 2007.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a de novo determination of those portions of the Report and Recommendation to which objections have been made. Upon a de novo review of the Report and Recommendation, and after reviewing the submissions of the parties, the Court

adopts the proposed findings of the Report and Recommendation, with one exception. The Court declines to adopt the Magistrate Judge's finding that the case should be allowed to proceed on plaintiff's claim under the Fourteenth Amendment. A review of the complaint indicates that plaintiff sets forth no facts regarding any Fourteenth Amendment violation. He only mentions the Fourteenth Amendment in the penultimate paragraph of the complaint, presumably as a jurisdictional basis for his Eighth Amendment claim. Thus, the complaint fails to state a Fourteenth Amendment claim separate and apart from the Eighth Amendment claim.

Accordingly, for the reasons set forth in Magistrate Judge McCarthy's Report and Recommendation and herein, defendants' motion for summary judgment is granted in its entirety and plaintiff's cross-motion for summary judgment is denied. The Clerk of Court shall take all steps necessary to close the case.

SO ORDERED.

s/ Richard J. Arcara  
HONORABLE RICHARD J. ARCARA  
CHIEF JUDGE  
UNITED STATES DISTRICT COURT

DATED: November 8, 2007